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In re: Determination of Statutory)	
License Terms and Rates for Certain)	No. 96-5
Digital Subscription Transmissions)	CARP DSTRA
of Sound Recording)	
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RIAA REPLIES IN SUPPORT OF MOTIONS TO COMPEL

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RIAA'S REPLY IN SUPPORT OF MOTION TO COMPEL SERVICES
TO PRODUCE IMMEDIATELY ALL DOCUMENTS UPON WHICH
THEIR WITNESSES RELIED AND TO PRECLUDE DIRECT
TESTIMONY REGARDING REQUESTED DOCUMENTS NOT PRODUCED

The Recording Industry Association of America ("RIAA") submits the following reply in support of its "Motion To Compel Services To Produce Immediately All Documents Upon Which Their Witnesses Relied And To Preclude Direct Testimony Regarding Requested Documents Not Produced" (filed Dec. 27, 1996) ("Motion").

RIAA was required to file its Motion because the Services claimed that they have a "right" to produce, at some later date, documents responsive to RIAA's discovery requests. RIAA sought an Order (1) compelling the Services to produce immediately all responsive documents and to state that they had done so and (2) precluding the Services from presenting direct testimony

regarding or relying upon documents that had been requested but not produced.

A. The Service's Discovery Obligation

1. DMX. In its Opposition, DMX reveals that there are in fact additional documents responsive to RIAA's discovery requests and that it will produce these documents "within a few days." Opposition at 2. DMX also represents that, with the exception of these documents, it "has produced all documents upon which its witnesses specifically relied at the time they prepared their direct testimony" Id.

Insofar as RIAA's Motion sought an order concerning DMX's discovery obligation, DMX has in effect provided the relief sought -- by agreeing to produce the remaining documents and representing that it will then have produced all responsive documents.

However, DMX offers no excuse, let alone any reasonable justification, for failing to have produced all responsive documents when they were due last month. DMX's unexplained and unjustified withholding of responsive documents has forced RIAA to incur the costs of filing this Motion and has deprived RIAA of valuable time (where time is of the essence) in reviewing relevant documents. DMX's conduct violates the rules of this proceeding and should not be condoned.

2. DCR and Muzak. According to Muzak and DCR, RIAA "recognizes that the Music Services have produced all nonprivileged documents responsive to the requests that were actually reviewed and relied upon by a witness." If Muzak and DCR are in fact representing that they have produced all such documents, that representation would provide the relief sought by RIAA's Motion with respect to their discovery obligations.

However, DCR and Muzak go on to argue that their initial discovery responses do no more than "properly reserve certain inherent rights;" that RIAA's Motion is "premature;" and that RIAA is attempting to impose a double standard. All of these arguments miss the point.

The Services -- not RIAA -- have sought to reserve a right to produce in the future additional responsive documents "should the need arise." Quite simply, there is no such right.

Either a witness relied upon a document or the witness did not rely upon a document in making a substantive assertion. If he or she did rely upon a specific document, that document was required to have been produced last month. If the witness relied upon his or her general knowledge and experience, no document was required to have been produced; by the same token, that witness cannot then rely upon some specific document during the hearing in attempting to defend the assertion

in issue. In preparing for cross-examination, all parties are entitled to review -- well in advance of the evidentiary hearings -- any documents on which a witness relies for particular direct testimony.

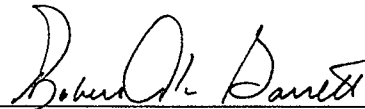
B. Hearing Testimony

DMX's revelation -- only in response to RIAA's Motion -- that it failed to produce certain relevant documents in a timely manner confirms the need for the order sought by RIAA's Motion. The Copyright Office should make clear that the Services may not offer direct testimony regarding or relying upon documents that were requested but not produced within the time limits imposed by the Copyright Office. Should it be determined at the hearing that a witness did in fact rely upon an undisclosed document for a particular factual assertion in his or her direct testimony, such testimony should be stricken by the CARP.

RIAA recognizes that a witness' "general knowledge and experience" is necessarily shaped over the years by the review of many documents. RIAA does not seek to preclude any witness from testifying on the basis of such knowledge and experience; nor does it seek each and every document that a witness may have reviewed during his or her career with respect to a particular issue. However, the witness should not be allowed to

enhance the credibility of particular direct testimony by relying during the hearings on specific documents unless those documents are produced beforehand as required by the Copyright Office.

Respectfully submitted,



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RIAA'S REPLY IN SUPPORT OF
MOTION TO COMPEL SERVICES TO IDENTIFY TO WHICH
REQUEST EACH PRODUCED DOCUMENT IS RESPONSIVE

The Recording Industry Association of America ("RIAA) submits the following reply in support of its "Motion To Compel Services To Identify To Which Request Each Produced Document Is Responsive" (filed Dec. 27, 1996) ("Motion").

RIAA was required to file its Motion because DCR, DMX and Muzak (the "Services") initially refused to identify the particular discovery requests to which each produced document is responsive. Each of the Services took the position that it could dump an undifferentiated mass of documents upon RIAA without providing any information as to which documents responded to which discovery request(s).

1. Muzak. By letter dated January 8, 1997, Muzak provided RIAA with the information sought by the Motion. Therefore, RIAA agrees that the Motion is moot with respect to Muzak. It is nevertheless troubling that RIAA was required to spend the time and resources associated with the filing of its motion in order to obtain information that is routinely exchanged in proceedings of this nature.

2. DCR. In its Opposition to RIAA's Motion, DCR also provided the information sought by the Motion. Therefore, RIAA agrees that the Motion also is moot with respect to DCR. Again, however, RIAA should not have been put to the unnecessary expense of having filed its Motion in order to obtain that information.

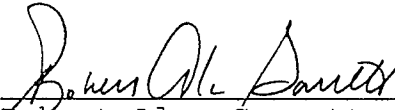
3. DMX. DMX argues that there is no requirement to identify which documents respond to which requests. DMX is wrong. As explained in RIAA's Motion, the source of that requirement is the Copyright Office's conclusion that "all documents offered in response to discovery requests must be furnished in as organized and usable form as possible." Order dated November 27, 1996, at 7.

DMX also argues that the Motion is moot with respect to DMX. Again, DMX is wrong. In its attachment to its December 18, 1996 letter (Motion at Attachment N), DMX stated that "Articles" are responsive to certain RIAA discovery requests. RIAA is entitled to know which

"Articles" are responsive to which requests. If DMX's witnesses did not in fact rely upon any of those unspecified "Articles," then DMX should amend its responses accordingly.

Likewise, DMX has not retracted the statement in its December 18 letter to the effect that some unidentified documents may be responsive to particular RIAA's requests. If there are such documents, RIAA is entitled to know what they are and to receive a copy of them.

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RIAA'S REPLY IN SUPPORT OF
MOTION TO COMPEL DCR TO PRODUCE DOCUMENTS

The Recording Industry Association of America ("RIAA") submits the following reply in support of its "Motion To Compel DCR To Produce Documents" (filed Dec. 27, 1996) ("Motion").

A. Documents Underlying Simon Surveys

1. Completed Valley Forge Surveys. While DCR has produced the blank questionnaire used in the Valley Forge survey, RIAA also has sought the questionnaires as completed by each respondent (minus information that identifies the respondent). DCR claims that the completed survey forms would not be of "any use."

Opposition at 2. But absent such documents, RIAA cannot verify the bottom-line figures proffered by Simon. RIAA is entitled to determine, at a minimum, whether the individual survey responses support the bottom-line numbers as claimed by Simon.

DCR also says it is "irrelevant" that the completed survey forms are routinely ordered to be produced in these proceedings. Opposition at 2. Clearly, however, there is no proper basis for ignoring such precedent. See, e.g., Order in CRT Docket No. 91-2-89CD, at 1 (Sept. 5, 1991) (requiring production of completed questionnaires underlying JSC survey); id. at 2 (requiring production of diaries underlying Nielsen viewing study).

2. Universe for Valley Forge Survey. DCR has refused to produce documents which identify the households within the universe of households selected for the Valley Forge survey -- all of which are subscribers to the DCR service. Absent those documents, RIAA has no way to conduct its own survey to test one of the central theories of DCR's direct case -- that DCR supposedly promotes the sale of sound recordings.

DCR says its subscribers should not be "subjected to unwarranted telephone interviews." Opposition at 2. But DCR has already "subjected" its subscribers to telephone interviews for the apparent purpose of

gathering information for this proceeding. RIAA should be afforded the same opportunity. Unless DCR promptly turns over the requested documents, RIAA will be deprived of that opportunity.

3. The Chilton Questionnaire. DCR says it has already provided the questionnaire for the Chilton survey. Opposition at 2. But the only portion of the questionnaire provided RIAA consists of a single question. See RIAA Motion at Tab S. DCR cannot possibly represent that the Chilton survey consisted of this question alone. RIAA is entitled to the complete questionnaire that was administered by Chilton -- particularly since the existence of other questions or information on the questionnaire could affect the validity and reliability of the survey results proffered by Simon. See, e.g., R.J. Reynolds Tobacco Co. v. Loew's Theatres, 511 F.Supp. 867, 875 (S.D.N.Y. 1980).

B. Music Choice Diary Study

As support for certain assertions made by Simon, DCR provided a single page from the middle of a "Diary Study." DCR, however, has refused to produce any documentation concerning this survey because the survey itself was not included in its direct case. Opposition at 2-3.

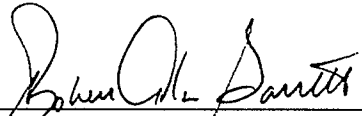
DCR's witness is relying upon the survey to support his substantive testimony. RIAA's right to basic information concerning this survey does not hinge upon DCR's decision to put the survey results in its witness' words instead of proffering the study. Compare 61 Fed. Reg. 40464, 40466 (Aug. 2, 1996) (follow-up discovery request for a survey underlying a document produced in discovery is proper).

C. Documents Underlying Bottom-Line Figures

DCR refuses to provide any documentation underlying the bottom-line figures in documents which support certain DCR testimony. Again, it mistakenly argues that the decision not to put these documents into the record directly exempts it from having to produce underlying documentation. Opposition at 3. If this position were correct (and it is not), there would be no reason to have "follow-up discovery requests."

DCR does not claim that the bottom-line figures are simply estimates that reflect the judgment of its staff. Rather, DCR's response implicitly acknowledges the existence of documents that allegedly support the bottom-line figures. DCR cannot properly shield these underlying documents from discovery.

Respectfully submitted,


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RIAA'S REPLY IN SUPPORT OF MOTION
TO COMPEL MUZAK TO PRODUCE DOCUMENTS

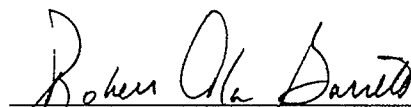
The Recording Industry Association of America ("RIAA") submits the following reply in support of its "Motion To Compel Muzak To Produce Documents" (filed Dec. 27, 1996) ("Motion").

RIAA was required to file its Motion because Muzak failed to produce documents underlying certain testimony, notwithstanding that it had previously agreed to produce those documents. Motion at 1-2. In a letter dated January 8, 1997, Muzak amended its earlier responses by stating that its witness had relied upon his general knowledge and experience with respect to the testimony in issue; therefore, it was not producing any documents concerning that testimony.

RIAA agrees with Muzak that the January 8 letter renders RIAA's Motion moot. It is nevertheless,

troubling that RIAA was required to spend the time and resources associated with the filing of its Motion in order to obtain Muzak's representation.

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RIAA'S REPLY IN SUPPORT OF
MOTION TO COMPEL PRODUCTION OF
ALL DOCUMENTS IN THE PUBLIC DOMAIN
RELIED UPON BY MUZAK'S WITNESSES

The Recording Industry Association of America ("RIAA) submits the following reply in support of its "Motion To Compel Production Of All Documents In The Public Domain Relied Upon By Muzak's Witnesses" (filed Dec. 27, 1996) ("Motion").

RIAA was required to file its Motion because Muzak initially stated that it was not producing certain "public domain" documents responsive to RIAA's discovery requests. Motion at 1-2. In its Opposition to RIAA's Motion, however, Muzak represents that it "has already produced all documents that were relied upon by its witnesses, and that were responsive to RIAA's requests for documents." Opposition at 1, 3.

RIAA understands that representation to mean that Muzak has in fact produced all "public domain" documents upon which its witness relied and which are responsive to RIAA's discovery requests. If that understanding is correct, RIAA's Motion is moot. It is nevertheless, troubling that RIAA was required to spend the time and resources with the filing of its Motion in order to obtain Muzak's representation.

Furthermore, in its Opposition, Muzak raises a new issue. Muzak appears to argue that it has the right to introduce, during direct testimony, any documents -- even if those documents were not filed on September 24, 1996 as part of its direct case. Neither Muzak nor any other party has such a right.

Section 251.47(e) of the Copyright Office rules states that "witnesses may not materially supplement or alter their written testimony except to correct it, unless the CARP panel expands the witness' testimony to complete the record." The effect of this provision is to prohibit a witness from, among other things, offering an exhibit during his or her oral direct testimony that was not exchanged as part of the written direct cases. Indeed, such exchange would quickly become meaningless if the parties were free to introduce during their oral testimony exhibits they had not be exchanged.

Absent a clear ruling from the Copyright Office on this issue, Muzak's apparent unfamiliarity with the CARP procedures will result in needless disputes before the CARP. RIAA therefore urges the Copyright Office to make clear that the parties may not introduce, during their oral direct testimony, any documents that were not exchanged on September 24, 1996. Obviously, that ruling would not preclude the parties from seeking to introduce documents during cross examination and redirect examination, consistent with the Copyright Office rules.

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Certificate of Service

I certify that a copy of the foregoing RIAA
Replies in Support of Motions to Compel was served by
U.S. Mail January 13, 1997, on those listed on the
attached Service List.


Patricia Copeland

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